

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT NO. G(W)199792-41M FORMERLY)
7325-41M BY KINGSBURY DITCH CO.)

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on January 30, 1995. Applicant filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting a conditional Authorization to Change Appropriation Water Right to Kingsbury Ditch Company to change points of diversion and places of use of water rights W199792-41M, W199793-41M, W199794-41M, W199795-41M, W199796-41M, W199797-41M, W199798-41M, W199799-41M, W199800-41M, W199801-41M, W199802-41M, W199803-41M, W199804-41M, W199805-41M, W199806-41M, W199807-41M, W199808-41M, and W199809-41M as follows:

The point of diversion shall be located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 1, Township 29 North, Range 8 West.

The places of use which total 3,400 acres shall be changed to:

Township 30 North, Range 7 West

Section 27 - 480.6 acres
Section 28 - 391.2 acres
Section 29 - 76.9 acres
Section 32 - 337.5 acres
Section 33 - 424.7 acres
Section 34 - 524.8 acres

Township 29 North, Range 7 West

CASE #

FILMED

Section 3 - 254.4 acres
Section 4 - 280.4 acres
Section 5 - 328.5 acres

Township 29 North, Range 8 West

Section 12 - 125.5 acres
Section 13 - 175.5 acres

The means of diversion is a headgate and ditch. The period of use shall remain as claimed from April 1 through November 15, inclusive of each year. The flow rate shall be 50 cubic feet per second for irrigation.

Applicant accepts the Proposal to the extent it addresses the water rights which are the subject of this matter. However, Applicant excepts to the Proposal in that it does not address all of the water rights which are the subject of this matter, specifically the stock water rights. The stock water is claimed by Statements of Claim W199810-41M, W199811-41M, W199812-41M, W199813-41M, W199814-41M, W199815-41M, W199816-41M, W199817-41M, W199818-41M, W199819-41M, W199820-41M, W199821-41M, W199822-41M, W199823-41M, W199824-41M, W199825-41M, W199826-41M, W199827-41M, and W199828-41M.

Applicant is correct; the stock water use was omitted by oversight.

THEREFORE, the Department makes the following:

ORDER

Authorization to Change Appropriation Water Right is granted to Kingsbury Ditch Company to change point of diversion and places of use of water rights for irrigation W199792-41M, W199793-41M, W199794-41M, W199795-41M, W199796-41M, W199797-41M,

W199798-41M, W199799-41M, W199800-41M, W199801-41M, W199802-41M, W199803-41M, W199804-41M, W199805-41M, W199806-41M, W199807-41M, W199808-41M, and W199809-41M as follows:

The point of diversion shall be located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 1, Township 29 North, Range 8 West.

The places of use for irrigation which total 3,400 acres shall be changed to:

Township 30 North, Range 7 West

Section 27 - 480.6 acres
Section 28 - 391.2 acres
Section 29 - 76.9 acres
Section 32 - 337.5 acres
Section 33 - 424.7 acres
Section 34 - 524.8 acres

Township 29 North, Range 7 West

Section 3 - 254.4 acres
Section 4 - 280.4 acres
Section 5 - 328.5 acres

Township 29 North, Range 8 West

Section 12 - 125.5 acres
Section 13 - 175.5 acres

Kingsbury Ditch Company is authorized to change the point of diversion and places of use for stock water rights W199810-41M, W199811-41M, W199812-41M, W199813-41M, W199814-41M, W199815-41M, W199816-41M, W199817-41M, W199818-41M, W199819-41M, W199820-41M, W199821-41M, W199822-41M, W199823-41M, W199824-41M, W199825-41M, W199826-41M, W199827-41M, and W199828-41M.

The point of diversion shall be located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 1, Township 29 North, Range 8 West.

The places of use for stock water are:

Township 30 North, Range 07 West,

Section 23
Section 24
Section 25 - NE $\frac{1}{4}$
Section 26
Section 31
Section 32
Section 33
Section 34

Township 29 North, Range 07 West

Section 2
Section 3
Section 4
Section 5

Township 29 North, Range 08 West

Section 11 - SE $\frac{1}{4}$
Section 14
Section 12 - W $\frac{1}{2}$

The means of diversion is a headgate and ditch. The period of use shall remain as claimed from April 1 through November 15, inclusive of each year for irrigation and from January 1 through December 31, inclusive of each year for stock water. The flow rate shall be 50 cubic feet per second.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2, and § 85-2-404 (1993).

B. The water rights shall be administered and water shall be distributed by the Pondera County Canal & Reservoir Company as stated in the Agreement signed by the parties on August 27, 1993.

C. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

D. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 18th day of April, 1995.

Larry Holman

Larry Holman, Chief
Water Rights Bureau
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 18th day of April, 1995 as follows:

Peter C. Pauly
Attorney at Law
P.O. Box 176
Helena, MT 59624

John Chaffin
Office of Solicitor
U.S. Department of Interior
P.O. Box 31394
Billings, MT 59107-1394

K. Dale Schwanke
Jardine, Stephenson, Blewitt
& Weaver, P.C.
P.O. Box 2269
Great Falls, MT 59403-2269

Bob L. Larson, Manager
Marvin Cross, CES
Havre Water Resources
Regional Office
P.O. Box 1828
Havre, MT 59501

Cindy G. Campbell

Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR CHANGE OF APPROPRIATION WATER)	FOR
RIGHT NO. G(W)199792-41M FORMERLY)	DECISION
7325-41M BY KINGSBURY DITCH CO.)	

* * * * *

A meeting was held in Helena, Montana, on December 14, 1994, for Applicant to provide an accurate map of the historical acreage and the proposed acreage to be irrigated. Those in attendance were: Vicky and Marvin Baker, representing Perkins Ranch; Mike S. Kleinsasser, Joseph Kleinsasser, and Joseph J. Wirtz, all of Kingsbury Colony; Marvin Cross, Civil Engineering Specialist with the Havre Water Resources Regional Office of the Department of Natural Resources and Conservation (Department); Cindy Campbell, Hearings Unit Legal Secretary; and the Hearing Examiner.

All objections to the above-entitled matter have been withdrawn by agreement to certain conditions between the parties or certain objectors have been found in default. However, Applicant is still required to show by a preponderance of evidence the criteria for issuance of an authorization to change appropriation water right have been met.

When the 1964 Pondera County Water Resources Survey was completed, there were approximately 2,860 acres under irrigation and approximately 1,095 acres were identified as potentially irrigable for a total of 3,955 acres on Applicant's property.

CASE #

FILED

The parties have agreed that all the acreage indicated as potentially irrigable was not developed and agreed that more than likely, 3,400 acres were irrigated prior to 1973. Therefore, Applicants have reduced the historic acreage to be changed to 3,400 acres. Applicants have reduced the "new" acreage to be irrigated to 3,400 acres. Some of the "new" acreage will overlap some of the historic acreage; however for clarity, the historic acreage will be listed and the "new" acreage will then be listed.¹ The water rights to be changed are: W199792-41M, W199793-41M, W199794-41M, W199795-41M, W199796-41M, W199797-41M, W199798-41M, W199799-41M, W199800-41M, W199801-41M, W199802-41M, W199803-41M, W199804-41M, W199805-41M, W199806-41M, W199807-41M, W199808-41M, and W199809-41M.

The historic places of use are:¹

Township 30 North, Range 7 West

Section 34 - 425 acres
Section 33 - 530 acres
Section 32 - 200 acres S $\frac{1}{2}$

Township 29 North, Range 7 West

Section 3 - 220 acres N $\frac{1}{2}$
Section 4 - 520 acres
Section 5 - 610 acres
Section 6 - 100 acres E $\frac{1}{2}$
Section 7 - 50 acres E $\frac{1}{2}$
Section 8 - 500 acres

¹All acreages are estimates and may be subject to further clarification during the claims examination procedure. Applicant should modify the underlying claims to reflect the acreages actually used.

¹These places of use may differ from the original application which reflected the inflated acreage claimed by the original owner.

Section 17 - 70 acres $N\frac{1}{2}N\frac{1}{2}$

Township 29 North, Range 8 West

Section 24 - 80 acres

Section 23 - 50 acres

Section 13 - 40 acres $W\frac{1}{2}SW\frac{1}{4}$

Section 14 - 5 acres $E\frac{1}{2}SE\frac{1}{4}SE\frac{1}{4}$

The proposed new places of use which total 3,400 acres are:

Township 30 North, Range 7 West

Section 27 - 480.6 acres

Section 28 - 391.2 acres

Section 29 - 76.9 acres

Section 32 - 337.5 acres

Section 33 - 424.7 acres

Section 34 - 524.8 acres

Township 29 North, Range 7 West

Section 3 - 254.4 acres

Section 4 - 280.4 acres

Section 5 - 328.5 acres

Township 29 North, Range 8 West

Section 12 - 125.5 acres

Section 13 - 175.5 acres

The points of diversion on Birch Creek to be changed are:

$NE\frac{1}{4}NE\frac{1}{4}$ Section 14, and $NE\frac{1}{4}NE\frac{1}{4}$ Section 1, both in Township 29 North, Range 8 West and $NE\frac{1}{4}SW\frac{1}{4}$ and Lot 23 in Section 23, Township 30 North, Range 7 West. The new point of diversion is the $NE\frac{1}{4}NE\frac{1}{4}NE\frac{1}{4}$ Section 1, Township 29 North, Range 8 West. Only the new point of diversion will be used.

The maximum flow rate through the diversion has been 50 cubic feet per second and shall remain 50 cubic feet per second.

All acreage is estimated and may be refined when the verification process is completed.

The diversion works have been in use for many years and are adequate, both in construction and operation.

The use has been irrigation and shall continue to be irrigation, a beneficial use.

There will be no adverse effect to the water rights of other persons or other planned uses or developments for which a permit has been granted or for which water has been reserved. There have been no waters reserved from the source, nor have there been any new permits granted. The objections have been resolved by negotiations with other water users who have agreed to conditions that will prevent adverse effect to other water users.

The Kingsbury Ditch Company is Perkins Ranch and Kingsbury Colony, both of which own the property where the water will be used. Therefore, Applicant has a possessory interest in the property where the water will be used.

There were no objections based on the issue of water quality; therefore Applicant is not required to provide proof regarding water quality issues.

This change does not involve salvage water; therefore Applicant is not required to show water-saving methods.

The criteria for issuance of an authorization to change appropriation water right have been met. THEREFORE, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Authorization to Change Appropriation

Water Right G(W)199792-41M, formerly 7325-41M, is hereby granted to Kingsbury Ditch Company to change the points of diversion and place of use of water rights W199792-41M, W199793-41M, W199794-41M, W199795-41M, W199796-41M, W199797-41M, W199798-41M, W199799-41M, W199800-41M, W199801-41M, W199802-41M, W199803-41M, W199804-41M, W199805-41M, W199806-41M, W199807-41M, W199808-41M, and W199809-41M as follows:

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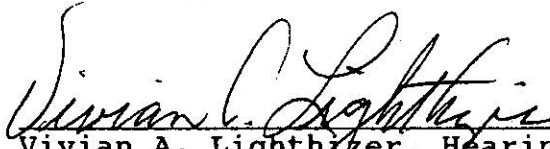
NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception

filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 30th day of January, 1995.


Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6615

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 30th day of January, 1995, as follows:

Peter C. Pauly
Attorney at Law
P.O. Box 176
Helena, MT 59624

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Cindy G. Campbell
Hearings Unit Legal Secretary

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